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Marriott Hartford Downtown Hotel, Employer-Petitioner and UNITE HERE Local 217. Case 34-RM-88

August 4, 2006

ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

The Employer-Petitioner's request for review of the Regional Director's decision and order is granted as it raises substantial issues warranting review. This case presents many of the same issues that the Board is addressing in several pending cases currently under Board review. See *Dana Corp.*, Cases 7-CA-46965 and 7-CB-14083; *Dana Corp.*, 341 NLRB 1283 (2004), granting review in Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519; *Shaw's Supermarkets*, 343 NLRB No. 105 (2004), granting review in Case 1-RM-1267; and *Rite Aid of West Virginia, Inc.*, Case 9-RM-1052.

Contrary to the assertion of our dissenting colleagues, our purpose in granting review is not to "meddle" with the rights of employees. Employees have the right to unionize or refrain from unionizing. Our purpose here is simply to inquire further as to how best to effectuate those rights. More particularly, there is a genuine issue as to whether the Union was requesting an agreement for card-check recognition, and whether such a request was a request for recognition.¹ Further, there is a policy issue as to whether an election (through the Employer's RM petition) is the better way to ascertain employee free choice. That free choice lies at the heart of employee rights.

We do not resolve these issues at this stage, but merely find that such issues merit review. Thus, what distinguishes us from our dissenting colleagues is the fact that we deem it necessary to consider these important issues, whereas our colleagues do not. *Shaw's Supermarkets*, *supra*.

¹ Sec. 9(c)(1)(B), the section of the Act providing for RM petitions, makes no mention of a claim for present or immediate recognition.

Accordingly, we grant the Employer-Petitioner's request for review.

Dated, Washington, D.C. August 4, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS LIEBMAN and WALSH, dissenting.

Continuing a recent trend,¹ today the Board reaches out to reexamine well-established law which protects workers' rights to organize. There can be no other purpose to granting review in this case other than to meddle with those rights. Based on the undisputed facts, however, there is no statutory justification for going forward with the Employer's RM petition. In fact, processing the Employer's petition would be contrary to Board precedent and clear Congressional intent, both of which require a finding that the Union has made no present demand for recognition. We therefore dissent from the grant of review.

I.

The facts are fully set forth in the Regional Director's decision and summarized briefly here. In August 2005, the Employer began operating a Marriott hotel in downtown Hartford, Connecticut. The Union, apparently planning to begin an organizing campaign, asked the Employer to "begin discussions about a Labor Peace agreement" at the hotel. When the Employer and the Union had not entered into any such agreement by fall of 2005, the Union sought community support. Various members of the community wrote letters to the Employer urging it to enter into a labor peace agreement. Some stated their intentions to boycott the hotel.

¹ See, e.g., *Shaw's Supermarkets*, 343 NLRB No. 105 (2004) (granting review to reexamine 30-year-old precedent on "after-acquired stores" clauses); *Dana Corp.*, 341 NLRB 1283 (2004) (granting review to reexamine 40-year-old precedent on voluntary recognition bar).

In a letter to the Employer dated April 6, 2006, the Union stated that it would be “commencing an organizing drive” among the hotel’s employees, and that the Union was “prepared to begin discussions to determine whether we might reach a ‘labor peace agreement’ setting ground rules for organizing.” The Union stated that it would “be interested in discussing an approach of the kind approved in *HERE Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993).”²

On April 18, 2006, the Employer filed an election petition with the Regional Office. On April 22, 2006, a local newspaper reported that union organizers and others had planned a rally in front of the hotel. According to the newspaper, a union representative stated that the Union was seeking a labor peace agreement that would “set ground rules for an organizing campaign”

On May 2, 2006, the Regional Director dismissed the Employer’s petition. Relying on *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), and other cases, the Regional Director found that the Union had not made a present demand for recognition within the meaning of Section 9(c)(1)(B) of the Act.

The Employer seeks review. The Employer argues that the Union “demanded” a card-check agreement, engaged in “representational picketing,” and “invoked” a city ordinance that, according to the Employer, applies only where there has been a demand for recognition. The Employer contends that the Union’s conduct amounted to a demand for recognition.

II.

Review should be denied. The Regional Director properly dismissed the Employer’s petition pursuant to *New Otani Hotel & Garden*, supra, well-established precedent prior to *New Otani*, and the Congressional purpose embodied in Section 9(c).

In *New Otani*, supra, the Board majority held that a union’s informational picketing and its repeated requests for a neutrality and card-check agreement did not constitute a present demand for recognition. Accordingly, the Board denied review of the Regional Director’s decision dismissing the Employer’s petitions. The Board reasoned that, although all organizing activities have recognition as an ultimate goal, it is the union’s prerogative to decide “when or whether to test its strength in an election

by its decision as to when or whether to request recognition” 331 NLRB at 1079 (quoting *Albuquerque Insulation Contractor*, 256 NLRB 61, 63 (1981)). The Board observed that, in *New Otani*, the union did not claim majority status or request an immediate card check. Rather, its request was conditional: it sought an agreement for a future card check if a majority of employees signed authorization cards. 331 NLRB at 1081. The Board expressly held that the union’s informational picketing—which advised the public that the employer was nonunion—did not, without more, establish a “claim to be recognized” as the exclusive bargaining representative.

The principle that *New Otani* exemplifies—that an employer petition must be supported by a *present* demand for recognition as the majority representative—is firmly rooted in Board precedent. See *Albuquerque Insulation Contractor*, supra at 62–63 (demand for an 8(f) agreement did not support a RM petition; “absent a claim by someone for recognition as the majority-supported representative of the employees, an employer is not entitled to an election under Section 9(c)(1)(B) of the Act”); *Windee’s Metal Industries*, 309 NLRB 1074 (1992) (reaffirming *Albuquerque Insulation*; “it would be contrary to the Congressional intent underlying Section 9(c)(1)(B) to find that any conduct with a representational objective, which falls short of an actual, present demand for recognition, will support an election petition filed by an employer”). Until the union demands recognition, an employer may not “short-circuit the process” by obtaining an election prematurely. *Albuquerque Insulation*, supra at 63.

Those Board decisions, in turn, are grounded in the plain language of the Act and its legislative history. Under Section 9(c)(1)(B), an employer’s election petition may be processed if a union has “presented to [the employer] a claim to be recognized as the representative defined in section 9(a)” The legislative history of Section 9(c)(1)(B) contains clear expressions of Congressional intent not to allow employers to interfere with nascent organizing by forcing an election before the union has made a demand for recognition.³

² In that case, the employer and the union entered into a detailed agreement containing organizing rules and a card-check procedure. The issue before the court was whether the district court had jurisdiction to adjudicate a dispute arising under the agreement. The court observed that the Board’s jurisdiction over representation matters is primary but not exclusive, and held that Section 301 of the Act grants district courts jurisdiction to enforce private representation agreements that meet certain standards. *Id.* at 565–568.

³ The Senate Report emphasized that the Board’s previous rule, which permitted employer petitions only if two or more unions made conflicting claims for recognition, had “been defended on the ground that if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant. . . . [T]his may be a valid argument for placing some limitation upon an employer’s right to petition, but it is no justification for denying it entirely. The committee has recognized this argument . . . by giving employers a right to file a petition *but not until a union has actually claimed a majority or demanded exclusive recognition.*” S.

Here, the Union's conduct cannot be construed as a present demand for recognition. The Union did not claim to represent a majority of the employees. Indeed, at the time the Employer petitioned for an election, the Union had barely commenced its organizing drive. Everything about the Union's actions supports the Regional Director's finding that the Union was "seeking the Employer's acceptance of a process that would enable it to obtain recognition," not recognition itself. Although the Employer contends that the Union engaged in "representational" picketing on April 22, that picketing does not establish that the Union's object was immediate recognition. Rather, the picketing was consistent with the Union's stated goal of persuading the Employer to enter into an agreement that would "set the ground rules for an organizing campaign."

Granting review in this case holds the potential of interfering with a nascent organizing campaign in a way that the settled principles reaffirmed in *New Otani* clearly forbid. But even if our colleagues might agree with the Employer's contention that *New Otani* was wrongly decided, this is the wrong case in which to reexamine that precedent. *New Otani* involved the issue of whether a request for a card-check agreement is equivalent to a demand for recognition. The present case is distinguishable. Here, the Union demanded neither a card-check agreement, nor any other particular agreement. The Union's reference to being "interested in discussing an ap-

proach of the kind approved" in a court case involving a card-check agreement does not rise even to the level of a demand for a card-check agreement, much less a demand for recognition.⁴

Finally, the Employer argues that the Union "invoked" the city of Hartford's Living Wage and Labor Peace Ordinance (LWO), described more fully in the Regional Director's decision. The short answer is that the Union did not invoke the LWO, expressly or otherwise. Even assuming arguendo that the Union relied on the LWO, the Employer cites no authority for its contention that the LWO applies only where there is a present demand for recognition, rather than an organizing campaign with the eventual goal of obtaining majority status.

III.

Established precedent, grounded in legislative intent, requires dismissal of the Employer's petition. Re-examining the Regional Director's decision and its solid legal underpinnings will serve no purpose but to interfere with, and potentially weaken, well-established worker rights to organize. Review should be denied.

Dated, Washington, D.C. August 4, 2006

Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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NATIONAL LABOR RELATIONS BOARD

Rep. No. 105, 80th Cong., 1st Sess., at 11 (1947), reprinted in 1 Leg. Hist. 417 (LMRA 1947) (emphasis supplied). See also 93 Cong. Rec. 1911 (Mar. 10, 1947), reprinted in 2 Leg. Hist. 983 (LMRA 1947) (remarks of Senator Morse)(employer petitions "may be subject to abuse, in that employers may seek an election at the earliest possible moment in an organizational campaign and thereby obtain a vote rejecting the union before it has had a reasonable opportunity to organize"; therefore, employer petitions should be limited "to those situations in which the union has made a claim to be recognized as the exclusive bargaining representative . . .").

⁴ *Rapera, Inc.*, 333 NLRB 1287 (2001), and *Brylane, L.P.*, 338 NLRB 538 (2002), cited by the Employer, are also distinguishable. In each of those cases, the union requested that the employer sign a card-check agreement. In *Rapera*, the union also stated to third parties that a majority of the employees has signed authorization cards.